

NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LINDA PEREZ and JASON PEREZ,

Plaintiffs,

v.

SPHERE DRAKE INSURANCE, LTD.,
f/k/a SPHERE DRAKE INSURANCE,
P.L.C.,

Defendant

CIVIL NO. 2001/11

TO: Lee J. Rohn, Esq.
Treston Moore, Esq. - Fax 777-5498

ORDER ON DEFENDANT'S MOTION FOR RE-HEARING
OF ORDER DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS MATTER came for consideration on Defendant's Motion for Reconsideration of the February 15, 2002 Order which denied Defendant's Motion for Protective Order. Plaintiff did not file opposition to the motion.

Pursuant to LRCi 7.4, a motion to reconsider shall be based on (1) intervening change in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. Defendant asserts that this motion, "...is based in part upon the availability of new evidence as discussed herein." LRCi 7.4(2) "Defendant has not argued nor provided evidence that any other Rule 7.4 criteria are applicable or have been met."

Defendant's new evidence is purportedly the "privilege log"

prepared by Attorney Quigley (Ex. "C" to the motion). Defendant argues that it was previously unable to prepare a privilege log because "...the file at issue was in possession of Attorney Quigley who refused to produce it to either party based on her belief that it contained privilege matters and that she needed consent for its production from both her clients, i.e. Sphere Drake and Ms. Wade. Sphere Drake had no way to prepare a log of documents in possession of a third party."¹ Defendant states further "...since the entry of this Court's Order, Attorney Quigley prepared a log which Sphere Drake is submitting to the Court with this motion."

Although Attorney Quigley had previously refused production of the file, there is no indication that she had previously been requested by Defendant to provide a log thereof and had refused to do so. Further, Defendant could have moved for assistance by the Court in such regard. Because Defendant was aware of the underlying subject matter and did not diligently seek creation and production of Attorney Quigley's log, the current production

1. Actually, Defendant could have prepared such log. Per *Catino v. The Traveler's Insurance Co.*, 136 F.R.D. 534 relied upon by Defendant herein, the only documents that are subject to protection are those covered by work-product privilege that are between the attorney and **the insurer** with regard to the anticipated second suit. Defendant *per force* has copies thereof.

thereof can hardly constitute "new evidence" within the meaning of Rule 7.4. See: *Totally Everything, Inc. v. ATX Research/ATX Technologies, Inc.*, 1998 WL 175602 *2 (E.D. Pa.); *Robinson v. Ford Motor Co.*, 1997 WL 164280 (E.D. Pa.).

Further, the log submitted at Exhibit C herein does not constitute a proper privilege log and provides no basis for review of the work product privilege as argued by Defendant in this motion. Fed. R. Civ. P. 26(b)(5) provides:

When a party withholds information otherwise discoverable under these rules by claiming that is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Under the rule the party asserting the privilege or protection must specifically identify each document or communication and the type of privilege or protection being asserted in a privilege log.

To properly demonstrate that a privilege exists, the privilege log should contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document....The summary should be specific enough to

permit the court or opposing counsel to determine whether the privilege asserted applies to that document.

Smith v. Dow Chemical Co. PPG et al. 173 F.R.D. 54, 57-58 (W.D. N.Y. 1977) [internal citations omitted]. See also, *McCoo v. Denny's, Inc.*, 192 F.R.D. 675, 680 (D. Kan. 2000). *In Re: Pfohl Brothers Landfill Litigation*, 175 F.R.D. 13, 20-21 (W.D.N.Y. 1997); *First American Corp. v. Al-Nahyan*, 2 F.Supp. 2d. 58, 63 N.5 (D.C. 1998); *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D. Kan. 1995).

The document prepared by Attorney Quigley and provided herein by Defendants is nothing more than an index of her files and an index of all correspondence therein. No documents are claimed to be privileged and the log provides no basis for further *in camera* review of the file.

Upon consideration, the Court finds that Defendant has not provided evidence that any of the Rule 7.4 criteria for reconsideration has been met. See *Hansen et al. v. U.S.A. et al.*, St. Croix Civil No. 1999/166, Order Chief Judge Finch dated August 8, 2000; *Fein v. Peltier*, 1997 WL 180771*1 (D.V.I.) [discussing similarly the appropriateness of motions for reconsideration prior to enactment of Rule 7.4].

Notwithstanding the above, Fed. R. civ. P. 60(b)(5) allows

relief from a court's order when it is not longer equitable that the order should have prospective application. Rule 60(b)(5) provides a catch-all provision that allows a court to vacate a judgement for any reason justifying relief from operation thereof. *Lehman v. U.S.A.*, 154 F.3d 1010, 1017 (9th Cir. 1998); *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977) [citing 7 J. MOORE, FEDERAL PRACTICE AND PROCEDURE 60.27(2), that Rule 60(b)(6), "is a grand reservoir of equitable power to do justice in a particular case."

Defendant's motion cites *inter alia* *Catino v. The Travelers Insurance Company*, 136 F.R.D. 534 (D. Mass.). That case contained a well-reasoned analysis of work-product protection in a factual situation similar to the one at issue herein. In *Catino*, the court found that Defendant insurer could invoke **work product protection** for documents that were prepared by the (common) attorney in anticipation of the subsequent litigation between the insured (or insured's assignee) and the insurer. In *Catino*, the subsequent litigation involved bad-faith issues that were anticipated from inception of litigation. The instant case similarly impacts a dispute concerning the limits of coverage and bad faith concerns emanating therefrom. *Catino* has been favorably cited by courts in our circuit. See *e.g.* *Buck v. Aetna*

Life and Casualty Company et al., 1992 WL 130024 *1 (E.D. Pa.);
Rhone Poulenc Rorer, Inc. et al. v. The Home Indemnity Company et al., 1991 WL 231781 *3 (E.D. Pa.).

Upon review of *Catino* and such other cases, the court finds that it erroneously failed to allow Defendant work product protection with regard to documents prepared by Attorney Quigley in anticipation of subsequent litigation concerning coverage (and bad faith related thereto) between Defendant and Dr. Wade (or Plaintiff as her assignee). To the extent the February 15, 2002 Order provided otherwise, it constitutes erroneous application of the law and will be corrected pursuant to Rule 60(b)(5) and/or (6). The remaining other arguments asserted by Defendant in this motion fail to persuade that any other change of such February 15, 2002 order is required.

Accordingly, it is hereby;

ORDERED as follows:

1. Defendant's Motion for Reconsideration is GRANTED in part, and the Order dated February 15, 2002 is amended to allow Defendant work product protection with regard to documents prepared by Attorney Quigley in anticipation of subsequent litigation concerning the extent of the applicable insurance limits and any bad

faith claim related thereto.

2. In furtherance thereof, Defendant shall serve and file a proper privilege log as provided in Fed. R. Civ. P. 26(b)(5) by April 30, 2002. Contemporaneous therewith, Defendant shall provide copies of any documents withheld pursuant to No. 1 above to the Court for *in camera* review. To the extent any document was prepared in anticipation of both Perez' initial case against Dr. Wade and this subsequent litigation, Defendant may include such documents within its privilege log and the documents copied for the court. *Catino*, 136 F.R.D. 534 at 538.
3. Defendant's motion is otherwise DENIED and Attorney Quigley shall otherwise produce her file as required by Plaintiff's subpoena.

ENTER:

Dated: April 15, 2002

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____ Deputy Clerk